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SUBJECT: MARINE JUDICIAL CASE: CONTINUED CLOSE COORDINATION
VITAL

REF: 2008 MANILA 2163 (MARINE CASE UPDATE: SUPREME
COURT TO HEAR CUSTODY ARGUMENTS)

Classified By: Ambassador Kristie A. Kenney for reasons
1.4 (b) and (d)

11. (C) SUMMARY. Renewed high-level judicial and political focus on the rape case of Marine Lance Corporal Daniel J. Smith has underscored the profound importance of this issue both for LCpl Smith's future and for U.S.-Philippine military and diplomatic ties. Strenuous U.S. government efforts over the past three years to ensure a fair and rapid judicial process for LCpl Smith -- and insulate the Visiting Forces Agreement from harmful effects that could seriously damage military and counterterrorism cooperation with a key ally in the war on terror -- have depended on meticulous and thorough consultations among the many actors in this crucial case. To date, the close, often daily consultations carried out among Embassy Manila, Pacific Command, Marine Forces Pacific and legal experts at State and Department of Defense on the many complex aspects of this case have enabled the USG to retain custody of LCpl Smith, continue to seek a just resolution to the case, and ward off efforts by activists to curtail -- or terminate -- U.S. military counterterrorism efforts here. Over the past few weeks, careful collaboration among all these elements (and vocal support from senior-most Philippine military and political leaders) enabled the Mission to weather a series of potential crises, including intrusive Supreme Court and Congressional hearings, aggressive media attention and a welcome and positive visit by LCpl Smith's family members. But the extraordinary emotion engendered by this case at all levels of Philippine society mandates that we continue to approach each and every aspect of the case with the greatest discretion and coordination. END SUMMARY.

BACKGROUND

12. (C) U.S. Marine Lance Corporal Daniel J. Smith was convicted by a Philippine trial court in December 2006 of raping a Filipino woman at Subic Bay in November 2005 and was sentenced to a maximum of 40 years in prison. Smith immediately filed an appeal of the conviction and the case was formally submitted to the Court of Appeals on October 15, 2007, where it has been pending since that time. Separate from the criminal case, the Supreme Court heard oral arguments September 19 regarding whether the Philippine government erred in transferring custody of Smith to the U.S. after the trial court found him guilty. A decision is pending in that case as well. Under the terms of the Visiting Forces Agreement (VFA), Smith has remained in U.S. custody on Chancery grounds since his arrest in November 2005, and the Embassy community as a whole has safeguarded Smith's safety, security, and welfare, and ensured that Smith's rights as a U.S. citizen and the requirements of the

VFA are respected. Statistically, the Smith case was the most reported story in the Philippines in 2006, garnering front-page space nearly every day during the trial. It continues to generate significant political, public, and media attention, and senior Embassy officials field questions on the case and its implications for the VFA routinely. Various leftist organizations have held numerous mostly peaceful demonstrations near the Embassy in the last three years.

BURST OF ACTIVITY

¶3. (C) The past few weeks have brought a burst of activity in LCpl Smith's case. Just days before LCpl Smith's parents arrived in the Philippines September 29 for a one-week visit, the Court of Appeals appointed a new three-judge panel to decide his nearly year-old appeal of his December 2006 rape conviction. Separately, a Supreme Court hearing September 19 on whether the Philippine government erred in turning over custody of Smith to the U.S. government turned into a broader discussion of the constitutionality of the Visiting Forces Agreement (VFA). The Supreme Court hearing prompted a joint Philippine Congressional oversight hearing September 25 to investigate allegations of violations of the VFA. While leftist organizations presented a negative picture of U.S. military involvement in Mindanao, complaining about the "permanent" nature of the U.S. military presence and involvement in "combat" operations against Muslim insurgents, key Philippine national and local officials strongly rebutted the allegations.

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SMITH'S PARENTS VISIT MANILA

¶4. (C) The arrival of LCpl Smith's parents in Manila September 29 for a one-week visit was an encouraging and positive development for LCpl Smith. His parents visited with their son several hours daily, significantly raising Smith's spirits, and requested that the Embassy take pictures of them with their son. During their visit, the parents met with Smith's lawyer, and also with Smith's commanding officer, who flew from Okinawa to meet them. The Ambassador met with Smith's parents October 3 to convey the Mission's sympathy for their situation and outline the Mission's persistent diplomatic efforts to move Smith's case forward. The Ambassador emphasized to the parents that the Smith case would remain a top Mission priority. The parents chose not to speak to the media, and their visit appears to have escaped media attention. As with their previous visit in March 2007, their travel and hotel expenses were quietly paid for by a local U.S. citizen businessman, who also arranged for their transportation while in Manila.

NO PROGRESS YET IN APPEALS COURT

¶5. (C) On September 26, the Court of Appeals appointed a new three-judge panel to decide Smith's case, composed of Justices Apolinario Bruselas, Hakim Abdulwahid, and Josefina Salonga. Bruselas, who was tasked with writing the decision, is noteworthy in that he penned a procedural decision in early 2007 that appears hostile to the U.S. interpretation of the Visiting Forces Agreement (VFA). Post is continuing to seek information on the views of the other two panel members.

SUPREME COURT HEARING SPARKS CUSTODY FEARS

¶6. (C) The Appeals Court move followed one week after Supreme

Court oral arguments on a civil petition alleging that the Philippine government erred in turning Smith over to U.S. Embassy custody after a trial court found him guilty and ordered him held by Philippine authorities. The argument turned into a broader discussion of the constitutionality of the VFA, as the petitioners asked the Court to reverse its previous finding that the VFA was constitutional. Most justices did not appear hostile to the VFA, with the exception Chief Justice Reynato Puno, whose questions suggested he might consider the agreement unconstitutional. As reported previously (reftel), in the 2000 case that affirmed the VFA's constitutionality, then-Associate Justice Puno wrote a dissenting opinion and was joined by four other justices. While no decision is expected from the Supreme Court hearing for several months, the September 19 hearing sparked one immediate controversy. One of the petitioner's attorneys claimed that a person in the U.S. military had told him that Smith had been transferred off of the U.S. Embassy grounds, sparking a two-week controversy despite Philippine officials' affirmation (and photographic proof) that Smith remained in custody at the Chancery.

CONGRESSIONAL HEARING ON VFA FAVORABLE FOR U.S.

17. (C) The Supreme Court hearing spawned yet another potentially problematic investigation, prompting the joint Senate/House of Representatives Oversight Committee on the VFA to hold a hearing September 25 to investigate allegations that U.S. military forces in Mindanao were violating the VFA. While leftist organizations presented a negative picture of U.S. military involvement in Mindanao, complaining about the "permanent" nature of the U.S. military presence and involvement in "combat" operations against Muslim insurgents, Department of Foreign Affairs VFA Chair Edilberto Adan, Zamboanga Mayor Celso Lobregat, Sulu Governor Abdusakor Tan, and Senator Miriam Santiago strongly rebutted the allegations, demonstrating the value of both the frequent attention these key figures receive from the Ambassador and other senior Country Team members, but also of significant U.S. development assistance their areas receive. Mayor Lobregat and Governor Tan expressed their appreciation and full support for continued American presence, with Tan stressing that the USG has done more for his province than the Philippine government, and that Sulu is peaceful because

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of the Americans. U/S Adan outlined the activities under joint U.S.-Philippine exercises, emphasizing the civic-humanitarian component, disclosing that from 2006 through 2008, the U.S. spent \$16.8 million in civic-military projects in Mindanao. Adan noted that complaints against the VFA are minimal compared to the benefits derived under it. Senator Santiago observed that the incidents of U.S. involvement cited were hearsay, not eyewitness accounts.

QUASHING UNAUTHORIZED CONGRESSIONAL VISIT

18. (C) As in the Supreme Court hearing, questions arose whether LCpl Smith was still on U.S. Chancery, prompting a Committee member to propose that a team of three Congressional members join VFA Chair Adan in a lightning visit to see LCpl Smith at the Embassy compound to verify his presence. In an effort to protect the integrity of the Chancery and limit access to Smith to appropriate government officials, the Embassy declined the request, permitting only VFA Chair Adan, who had previously visited Smith, to verify the Lance Corporal's presence, on behalf of the Committee, on September 25. Adan's visit, which was reported to the media, effectively refuted assertions that Smith was no longer on the compound, putting an end to this red herring. A key argument in turning off the Philippine Congressional visitors was noting that our custody agreement with the Philippine

government laid out clearly who was authorized to verify Smith's custody, and that introducing unnamed outside visitors was not in keeping with the agreement. Also at the hearing, a Committee member suggested that a Congressional delegation made up of Senators and Representatives visit WESTMINCOM and JSOTF October 2 to see temporary U.S. military accommodations first hand (septel).

CONTINUED DISCIPLINED POLICY APPROACH VITAL

¶9. (C) In this highly charged political environment, it is imperative for the USG to continue to adhere to strict policy and procedural discipline on issues raised by the Philippine government. Recently, the Philippine Department of Foreign Affairs separately contacted U.S. defense officials directly for USG views on the treaty status of the VFA, as well as U.S. Department of Justice officials. While we hope the goal was merely to obtain good information, we do not discount "forum shopping" to seek a certain interpretation of U.S. treaties and laws. Given the profound implications of all VFA discussions for both our military activities and for LCpl Smith's case, it remains vital to ensure continued coordination, with the Embassy in the lead, on any contact with Philippine government agencies and actors in regards to both the Smith case and the Visiting Forces Agreement.

COMMENT: INTENSE FOCUS TO REMAIN;
CONTINUED CLOSE USG COORDINATION IMPERATIVE

¶10. (C) The burst of activity surrounding LCpl Smith in the past few weeks validates once again this Mission's -- and the U.S. government's -- intensive focus over the past three years on this highly fraught controversy, which has serious consequences not only for LCpl Smith, but the most crucial elements of our diplomatic and military ties with the Philippines. Our ability to navigate recent tumultuous events has depended on near-daily attention devoted to this issue by the Ambassador, our Marine working group, and all our civil and military elements, as well as our vital coordination with PACOM, MARFORPAC, and State and Department of Defense legal teams in Washington. These efforts have been key in fostering as rapid a resolution of the case as possible. As demonstrated by the recent linking in the Supreme Court hearing of Smith's case to the constitutionality of the VFA and to the legality of our JSOTF deployment, a misstep in our handling of the case could have profound implications for all parts of the Philippine-U.S. military relationship. It was only through the strenuous efforts of the Mission and JSOTF that a potentially problematic Congressional investigation into the legality of JSOTF's mission in Zamboanga was turned into a reaffirmation of our relationship by key military contacts.

KENNEY